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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: A. T. Kearney, Inc.

File: B-237366; B-237366.2

Date: February 14, 1990

- John W. Egan, for the protester.
David J. O'Connor, Environmental Protection Agency, for the agency.
Peter A. Iannicelli, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office will not review a protest of an affirmative determination of responsibility absent a showing that it was made fraudulently or that definitive responsibility criteria set out in the solicitation were not met.
2. Discussions were meaningful where agency imparted sufficient information to protester to afford it a fair and reasonable opportunity to identify and correct any deficiencies in its proposal and written discussion questions were designed to guide protester into those portions of its proposal that required clarification, additional support or modification.
3. Protest that agency improperly raised protester's proposed costs in cost evaluation for cost-type contract without holding discussions with protester concerning alleged cost deficiencies is denied, where the contracting agency reasonably relied upon findings of Defense Contract Audit Agency that protester's costs were understated, and record shows that protester was not competitively prejudiced in any event.

DECISION

A. T. Kearney, Inc., protests the Environmental Protection Agency's (EPA) award of a contract for support services for ionizing and nonionizing radiation programs to S. Cohen and Associates, Inc., pursuant to request for proposals (RFP)

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No. D900367N1. Kearney charges that the contracting agency: (1) did not evaluate proposals in accord with the RFP's stated evaluation criteria; (2) improperly determined that Cohen was responsible; (3) did not hold meaningful discussions with Kearney; (4) improperly allowed the chairman of the technical evaluation panel to review the cost proposals of offerors in the competitive range, thus tainting all technical evaluations; and (4) improperly eliminated Kearney's proposal from the competitive range and then held further discussions with the awardee alone.

We deny the protest.

Issued on February 24, 1989, the RFP solicited offers for support services related to various areas, including: (1) measurement, exposure and transport analyses/problem assessment for radiation and radioactive materials; (2) radiation contaminant diagnosis, mitigation, and prevention support; (3) radiation health effects analysis; (4) engineering cost analysis; (5) environmental impact statement drafting/analysis; (6) regulatory impact and policy analysis; (7) public hearing support and docket analysis; and (8) technical review and editing. The RFP contemplated award of a cost-plus-award-fee contract for a base period of 2 years, with an overlapping option period of 2 years (the first year of the option period runs concurrently with the second year of the basic contract), for a total potential contract period of 3 years.

The RFP stated that award would be made to the responsible offeror whose conforming offer was considered most advantageous to the government, cost or price and other factors considered. The RFP indicated that technical quality was more important than cost or price and that the technical criteria were: overall company experience; staff qualification and utilization; and program management. The RFP also stated that offers would be evaluated on both the basic contract period and the option period.

Five offerors submitted initial proposals by the April 10 closing date. After EPA officials evaluated each offeror's initial technical and cost proposals, the contracting officer made a determination that three offerors' proposals, including Kearney's and Cohen's, had a reasonable chance for award and should be included in the competitive range; the source selection official concurred. Discussions with the three offerors in the competitive range were initiated on July 14 by telephone and written discussions followed. All three offerors in the competitive range submitted best and final offers (BAFOs) by the July 31 closing date.

A technical evaluation panel examined the three BAFOs and recommended that the contract be awarded to Cohen, because, relative to the BAFOs of the other two offerers, Cohen's BAFO showed that the firm was "clearly the technically superior contracting firm by a large margin." Kearney's BAFO received the lowest overall technical evaluation score. The cost proposals were also examined by EPA cost analysts whose report incorporated the results of Defense Contract Audit Agency (DCAA) audits of each proposal. Reports concerning the technical evaluation and the cost evaluation were given to the source evaluation board which convened on September 22. After examining the cost and technical evaluations, the source evaluation board unanimously recommended that the contract be awarded to Cohen, because Cohen's BAFO was technically superior to the other two offerers' BAFOs while Cohen's evaluated cost was the lowest.

On September 28, the contracting officer determined that the competitive range should be narrowed to Cohen alone and that the contract should be awarded to Cohen; the source selection official approved both determinations. Final negotiations were held with Cohen, the only offeror remaining in the competitive range, on September 30. By letters dated September 30, the other two offerors were notified that the competitive range had been further narrowed and that their offers were no longer being considered. Kearney filed its initial protest letter in our Office on October 13. On November 3, EPA made award to Cohen notwithstanding the protest.

Kearney argues that the technical evaluation team did not evaluate proposals in strict accord with the RFP's stated criteria. Kearney contends that the evaluators improperly considered the experience of subcontractors in rating proposals in the evaluation factor entitled "overall company experience," even though the RFP specified that this criterion related only to the offering firm. Conversely, Kearney contends that the evaluators also evaluated proposals improperly in the criterion entitled "staff qualification and utilization," because the evaluators did not consider the qualifications of subcontractors' staff, even though the RFP specified that the overall team would be considered in this criterion. However, we have examined the technical evaluation materials in camera and find that there is no support for Kearney's allegation. The technical evaluation reports contain no evidence that the evaluators examined the experience of subcontractors for either Kearney or Cohen when evaluating proposals in the "overall company experience" criterion as Kearney asserts. Furthermore, the technical evaluation reports show that, contrary to Kearney's allegation, the evaluators did consider the entire

team proposed, including any subcontractors, as specified in the "staff qualification and utilization" criterion of the RFP.

Kearney next charges that Cohen is not a responsible contractor for purposes of the work required under this contract, and, therefore, the contracting officer's determination that Cohen is responsible is "absurd." Kearney argues that Cohen cannot provide the approximately 600,000 hours of professional labor that will be required under the contract. However, our Office will not review a protest of an affirmative determination of responsibility absent a showing that it was made fraudulently or that definitive responsibility criteria set out in the solicitation were not met. See CORE Int'l, Inc., B-225640, Jan. 21, 1987, 87-1 CPD ¶ 78. Neither exception applies here.

In any event, we note that Cohen is the incumbent contractor and apparently has already successfully performed many of the tasks required under the present contract. Moreover, the record contains very thorough evaluations of Cohen's technical and cost proposals which clearly show that the evaluators were convinced that Cohen's team could not only do the job but could do it very well.

In its initial protest letter and in a subsequent letter purporting to provide details and support for Kearney's initial protest, Kearney made the general allegation that EPA did not hold adequate discussions with it, and, therefore, the firm was not given an opportunity to revise and improve its proposal when it submitted its BAFO. Kearney did not provide any specific details to show how the discussions were insufficient nor how Kearney could have improved its proposal in its BAFO if discussions had been more comprehensive. It was only when Kearney filed its comments on EPA's report responding to the initial protest that Kearney alleged a specific fault in the conduct of discussions. In its comments, Kearney alleged that the discussions were inadequate because they did not inform Kearney that the agency considered some of Kearney's proposed costs to be too low.

The Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b)(4)(B) (1988), as implemented in Federal Acquisition Regulation § 15.610(b), requires that written or oral discussions be held with all responsible offerors whose proposals are in the competitive range. For competitive range discussions to be meaningful, agencies must point out deficiencies in proposals unless doing so would result in

technical transfusion or leveling. URS Int'l, Inc., and Fischer Eng'g & Maintenance Co., Inc.; et al., B-232500 et al., Jan. 10, 1989, 89-1 CPD ¶ 21.

Although agencies are not obligated to afford offerors all-encompassing discussions, or to discuss every element of a technically acceptable proposal that received less than the maximum possible score, they still generally must lead offerors into the areas of their proposals which require amplification. Id. Discussions should be as specific as practical considerations will permit in advising offerors of the deficiencies in their proposals. Id. The actual content and extent of discussions are matters of judgment primarily for determination by the agency involved, and our Office will review the agency's judgments only to determine if they are reasonable. Technical Servs. Corp., B-216408.2, June 5, 1985, 85-1 CPD ¶ 640.

Concerning technical matters, Kearney made only a general assertion that the discussions were inadequate and did not provide any detailed description as to why it believes the discussions were not acceptable. Nonetheless, in light of Kearney's allegation, we examined all evaluation materials and the written record of the negotiations, and we conclude the discussions were adequate and that EPA reasonably led Kearney into those areas of its technical proposal that required amplification.

The record shows that, after initial proposals were evaluated, the technical evaluation panel made up a list of questions for each offeror regarding the perceived deficiencies in their initial proposals. The panel listed a total of 23 questions, 14 of which were technical in nature, concerning Kearney's proposal. Even though EPA was not required to discuss every element of Kearney's proposal that received less than a perfect score, that is essentially what EPA did here. The proposals were evaluated in each evaluation factor and subfactor enumerated in the RFP, and given a numerical score that represented the consensus of the evaluators. The scoring for each subfactor was on a scale of one to five, with five representing a proposal that is superior in most features. Even though a proposal was not deemed deficient in a particular area, if the proposal did not receive a consensus score of five for the relevant subfactor, EPA earmarked the proposal for discussions on that point and asked the offeror for clarification through the discussion questions.

We will discuss only a couple of examples here to show why we believe that EPA reasonably led Kearney into areas of its proposal that required amplification or revision. The

examples we have chosen are in those areas of Kearney's proposal that were considered weakest by the evaluators.

The first illustration is related to the evaluation of Kearney's proposal on the staff qualifications and utilization factor and, more specifically, to the subfactor concerning availability of key personnel. This subfactor was worth 30 points out of a total of 150 evaluation points for all technical factors combined, and was a major deficiency perceived by the evaluators in Kearney's proposal. For this subfactor, the RFP stated:

"The offeror shall demonstrate the continuous availability of 'key' personnel, including the likelihood that the 'key' personnel will be available during the life of this contract or that equally experienced/qualified persons will be available to take their place if required. The demonstration shall include a discussion of (1) the current projects in which they are involved and their respective termination dates, and (2) length of experience with present and past employers and projects."

The technical evaluation panel criticized Kearney's initial proposal on the availability of key personnel, in part because the project manager was only available 30 percent of the time during the first year of the contract. Moreover, several other managers, considered essential by the evaluators, were not devoted exclusively to the present contract. The evaluators also considered the proposal weak because it did not clearly identify which employees were considered by Kearney to be essential to the contract.

Discussion question No. 12 addressed the perceived weakness in Kearney's proposal as follows:

"The Offeror's proposal does not identify 'key' personnel, per se; everyone seems to be included. . . . In addition, there is a real problem with availability. Of the Project Manager and the five (5) Task Managers (TM's), only two (2) are listed as being available more than 60% of the time. Critical is the fact that the Project Manager would only be available 30% of the time during the first year. Most staff with radiation experience are with NUS and other 'subs'. They also have limited availability (generally less than 25% of time). With the Prime lacking radiation experience, this low availability becomes a major problem.

"Considerable clarification of these issues is required before the Offeror's ability to meet the requirements . . . can be determined. . . . The first question of 'availability' applies to these 'key' individuals and the prospects for replacing them, if necessary."

Discussion question No. 18 also dealt with the availability of the project manager and stated in part:

"Although the Project Manager appears competent, only 30% of his time is allocated to this contract during the first year. During this initial, and most crucial, period of contract performance, 70% of the Project Manager's work will be carried out by [a substitute for the Project Manager] (who does not have nearly the qualifications of [the Project Manager]); and this could rise to 100% if he should become unavailable for any reason. This poses a sufficiently serious potential problem to warrant it being addressed at the proposal stage. Please elaborate."

Kearney's response to the discussion questions did little to allay the evaluators' concern about availability of key personnel. First, Kearney identified 45 employees as key personnel; the evaluators judged this number to be too high to be meaningful. Second, the evaluators were still concerned that several managers, including the project manager, appeared to be committed to the EPA contract at the same time they were committed to other contracts. Thus, the evaluators concluded that the issue was at best confused by Kearney's BAFO.

The second example also relates to the staff qualification and utilization factor; more precisely, the evaluators considered Kearney's initial proposal weak in the subfactor concerning the competence and experience of the personnel proposed as part of Kearney's team, including subcontractors. The RFP stated that this subfactor was worth 15 points and that the overall team would be evaluated as follows:

"Substantiated personnel with documented academic training and professional experience in health physics, nuclear engineering, and in other radiation related areas. There must be demonstrated senior level competence and experience in analysis and understanding of radiation physics; environmental transport of

radionuclides; radiation contaminant measurement, diagnosis, mitigation, and prevention; as well as radiation source term assessment, internal and external dosimetry, health effects and risk analysis assessment."

The technical evaluation panel was skeptical about the claimed experience of Kearney's staff and believed that better documentation to substantiate the claimed experience was needed. Furthermore, the evaluators were concerned because most, if not all, of Kearney's radiation experience was perceived as being drawn from employees of Kearney's proposed subcontractors.

The evaluators asked about the perceived deficiencies in Kearney's initial proposal in question No. 10:

"Some clarification is required in order to properly evaluate the Offeror's experience . . .

Problem: Most, if not all, radiation experience resides with the 'subs', mainly NUS. It is important that the Offeror indicate how, based on utilization of some aspect of its corporate experience, the obvious difficulties in this situation are to be avoided. For example, how will the Prime be able to properly evaluate 'sub' work products, maintain product quality control, resolve technical issues/problems, and accomplish other tasks typical to project management under this radiation-specific contract?"

Question No. 11, addressing Kearney's weakness in documenting its staff's experience, stated in part:

"Considerable clarification is required in order to be able to adequately substantiate the experience of the staff . . ."

Question No. 12, quoted above, also directed Kearney to the evaluators' concern with the fact that most radiation experience was derived from subcontractor personnel.

In response to these questions, Kearney apparently gave additional documentation and explanations required to support its claimed experience, and the evaluators upgraded Kearney's score in the personnel experience subfactor. However, while the technical evaluation panel believed that

the revisions submitted in Kearney's BAFO showed the Kearney team to have "adequate experience to handle the contract," the evaluators still believed that Kearney had made "strained attempts" to claim required senior level expertise for certain of its in-house staff members. Accordingly, Kearney did not receive a superior rating for this subfactor.

One of the basic functions of discussions is to disclose deficiencies. In evaluating whether there has been sufficient disclosure of deficiencies, the focus is not on whether the agency described deficiencies in such intimate detail that there could be no doubt as to their identification and nature, but whether the agency imparted enough information to the offeror to afford it a fair and reasonable opportunity in the context of the procurement to identify and correct deficiencies in its proposal. See Eagan, McAllister Assocs., Inc., B-231983, Oct. 28, 1988, 88-2 CPD ¶ 405. The degree of specificity necessary in disclosing deficiencies to meet the requirement for meaningful discussions is not a constant, but rather, varies according to the degree of specificity of the solicitation. Id. Therefore, where a solicitation sets forth in great detail what is required of an offeror, discussions may be more general and still give an offeror a fair and reasonable opportunity to identify and correct deficiencies. Id.

In our view, the present record shows that EPA held meaningful discussions with Kearney. First, the RFP described in very precise terms what the evaluation factors/subfactors were and what was expected of each offeror. Second, the discussions questions clearly were designed to guide Kearney to those portions of its proposal that required clarification, additional support or modification. As the above examples show, EPA's discussions questions were directed towards any deficiencies the evaluators perceived in Kearney's proposal. Moreover, EPA propounded questions pertinent to any subfactor that was evaluated at less than the highest available rating of superior. In sum, we conclude that the discussions reasonably should have led Kearney into the areas of its proposal that were in need of revision or amplification, particularly in view of the fact that the RFP was very specific in describing exactly what offerors were expected to provide in their proposals in each evaluation subfactor. See Stewart-Warner Corp., B-235774, Oct. 5, 1989, 89-2 CPD ¶ 314.

Subsequent to receipt of the EPA report on its initial protest, Kearney raised two additional arguments. Kearney alleged that EPA improperly allowed the chairman of the

technical evaluation panel to review the cost proposals of the offerors in the competitive range. Kearney also argued that EPA improperly raised the costs proposed by Kearney without holding discussions with the firm.

Concerning Kearney's charge that the chairman of the technical evaluation panel improperly was given cost proposals, EPA acknowledges that the technical evaluation panel also examined cost proposals. Apparently, after the technical evaluation panel evaluated initial technical proposals and prepared a report for the source evaluation board, the panel examined each offeror's cost proposal looking for any inconsistencies between the technical and cost proposals. Similarly, after the technical evaluation panel prepared a report on the technical portion of BAFOs, the panel examined each offeror's cost proposal and reported the results to the source evaluation board.

While Kearney argues that all the technical evaluations were tainted because the technical evaluation panel saw offerors' initial cost proposals before evaluating BAFOs for technical merit, Kearney has not explained how or why it believes the technical evaluations were tainted. As noted above, the technical evaluation panel reviewed cost proposals only after it had evaluated technical proposals, both at the initial proposal stage and at the BAFO stage. Furthermore, all three offerors remaining in the competitive range were treated the same in that their cost proposals were reviewed by the technical evaluation panel. Moreover, our examination of the evaluation materials finds no evidence that Kearney was prejudiced by the fact that the panel analyzed initial cost proposals before they evaluated BAFOs for technical merit or that the evaluators changed their views towards any technical proposal after seeing cost proposals.

Regarding the protester's charge that the agency improperly raised the protester's proposed labor rates without discussion, Kearney states that it had no knowledge of any perceived cost-related deficiencies in its proposal until EPA provided cost data as part of its report on the protest. According to Kearney, EPA improperly evaluated Kearney's proposal on the basis of direct and indirect labor rates that were higher than the actual rates proposed by Kearney in its BAFO without giving Kearney an opportunity to explain why it selected those labor rates or to revise its proposal to reflect direct and indirect labor rates that were developed by Kearney subsequent to submission of its BAFO.

The record shows that EPA gave Kearney's initial cost proposal to DCAA to audit the costs proposed by Kearney.

DCAA found that Kearney had proposed on the basis of labor rates that were more than a year old and that Kearney did not use any escalation factor over the 3-year period of the contract. The largest components of what DCAA believed to be understated costs were direct labor, indirect labor, overhead, general and administrative, and subcontract costs. DCAA suggested that Kearney had understated its costs by about \$2.9 million. DCAA also reported numerous accounting deficiencies in Kearney's proposal.

After BAFOs were submitted, EPA's cost analysts examined Kearney's cost proposal and the DCAA audit report and determined that Kearney's proposed costs were actually understated by \$2,793,937. EPA added this amount to Kearney's proposed costs to obtain an evaluated cost total of \$27,163,850. Thus, based upon evaluated costs which the agency believed represented a more realistic cost estimate, Kearney's BAFO would be more costly to the government. On September 26, the contracting officer determined that, based upon the superior technical merit and lower evaluated cost to the government of Cohen's BAFO, the competitive range should be narrowed to Cohen alone. After "wrap up" negotiations with Cohen, the contract was awarded to that firm.

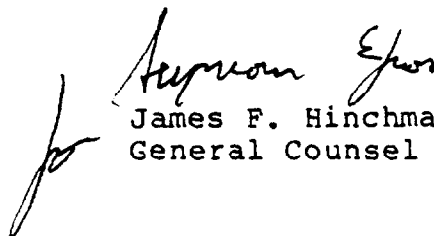
We have held that there is nothing improper per se in an agency's making more than one competitive range determination and in dropping a firm from further award consideration, so long as the firm's exclusion was ultimately justified. See Merret Square, Inc., B-220526.2, Mar. 17, 1986, 86-1 CPD ¶ 259; BASIX Controls Sys. Corp., B-212668, July 2, 1984, 84-2 CPD ¶ 2. Moreover, we have frequently held that, in cost-reimbursement contracts, evaluated costs are a better basis than proposed costs for judging the likely cost of a contract to the government. Booz, Allen & Hamilton, 63 Comp. Gen. 599 (1984), 84-2 CPD ¶ 329. Our review of an agency's cost realism assessment is limited to determining whether the agency's cost realism evaluation was reasonable. See MAR, Inc., B-215798, Jan. 30, 1985, 85-1 CPD ¶ 121. Here, EPA generally used the rates suggested by DCAA instead of the out-of-date rates proposed by Kearney; in our view EPA's evaluation of BAFO costs after updating the DCAA audit of initial proposals was reasonable. Booz, Allen & Hamilton, 63 Comp. Gen. 599, supra.

Further, the RFP indicated that technical evaluation factors were considered more important than cost, and the evaluation of BAFOs showed that Cohen's proposal was significantly superior to Kearney's offer in technical merit. EPA states that, even if it had relied upon Kearney's proposed costs

plus fee, which were less than 4 percent below Cohen's proposed costs plus fee, EPA would still have decided to narrow the competitive range and make award to Cohen. The record appears to support EPA's decision to narrow the competitive range and to award to Cohen whether Kearney's proposed or evaluated costs are used, because Cohen's technical superiority far outweighs the cost advantages, if any, of Kearney.

In our view, Kearney has suffered no competitive prejudice in this case. As competitive prejudice is an essential element that must be shown by a protester if it is to prevail in its bid protest, and as EPA's narrowing of the competitive range appears reasonable in any event, EPA's failure to advise Kearney of the alleged cost-related deficiencies provides no basis to upset the award to Cohen. See Tampa Shipyards, Inc., B-231802, Sept. 30, 1988, 88-2 CPD ¶ 304.

The protest is denied.


James F. Hinchman
General Counsel